

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RANCE BALL

Claimant

VS.

**EASTON MFG CO INC
SMITH TEMPORARY SERVICES
HARPER TRUCKS INC.**

Respondent

AND

**AETNA CASUALTY & SURETY
FIDELITY & CASUALTY OF NEW YORK
HARPER TRUCKS, INC.**

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket Nos. 181,130
181,131
& 181,132

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Shannon S. Krysl dated September 14, 1994.

APPEARANCES

The claimant appeared by his attorney, Steven Foulston; the respondent, Easton Manufacturing Co., Inc. and their insurance carrier, Aetna Casualty & Surety, appeared by their attorney, Edward D. Heath, Jr.; the respondent, Smith Temporary Services and their insurance carrier, Fidelity & Casualty of New York, appeared by their attorney, D. Steven Marsh; the respondent, Harper Trucks Inc., a qualified self-insured, appeared by their attorney, Gary A. Winfrey; and the Workers Compensation Fund appeared by its attorney, Scott J. Mann.

RECORD & STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the award. The Appeals Board has adopted the stipulations listed in the award.

ISSUES

The issues to be considered on appeal are:

DOCKET NO.181,130:

- (1) Nature and extent of claimant's disability;
- (2) Whether claimant is entitled to reimbursement for unauthorized medical expense; and
- (3) Whether claimant is entitled to future medical.

DOCKET NO.181,131:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment;
- (2) Whether claimant gave notice of his injury and, if not, whether prejudice was shown;
- (3) Nature and extent of claimant's disability; and
- (4) Average weekly wage.

DOCKET NO.181,132:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent;
- (2) Whether claimant gave notice of his injury and, if not, whether prejudice was shown;
- (3) The nature and extent of claimant's resulting disability; and
- (4) Whether claimant had made material misrepresentations on his employment application with Harper Trucks, Inc. such that Harper Trucks, Inc. should be treated as having knowledge of claimant's pre-existing impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds as follows:

DOCKET NO. 181,130

- (1) Claimant has a twenty-five percent (25%) permanent partial general disability arising from his employment with respondent, Easton Manufacturing Co., Inc.

Claimant worked for Easton Manufacturing from September 16, 1991 to June 24, 1992. He initially worked as a machine operator manufacturing parts, a job which required him to repetitively twist, push, pull and grasp with his hands. After approximately

five (5) months, he began experiencing pain in his wrists and forearms. Claimant notified the owner, Bill Easton, who then provided claimant with splints to wear at work. Claimant continued to work but because of his problems was eventually referred to Dr. Stephen Sparks.

Dr. Sparks treated claimant from March 4, 1992 to June 10, 1992. The time records indicate claimant worked off and on during the period he was under Dr. Sparks' care, often working less than his regular forty (40) hour week. Dr. Sparks released claimant with restrictions on June 10, 1992.

After the release by Dr. Sparks, claimant returned to work for respondent full time at the same wage he had been earning prior to the injury. Although he was moved to a job in the mill, the job duties were similar to those he had performed prior to the injury. Claimant worked only approximately two (2) weeks and his last day at work for the respondent, Easton Manufacturing, was June 24, 1992.

The reasons claimant left employment with Easton Manufacturing are in dispute. Claimant contends his supervisor advised him they did not have work within his restrictions. Respondent asserts, on the other hand, that claimant was terminated for unexcused absences. Claimant provides uncontradicted testimony about a conversation with his supervisor at the time he was terminated. He identified the supervisor by first name and testified this supervisor advised him they had no work within the restrictions. Respondent, on the other hand, introduced documents indicating that claimant had three (3) unexcused absences as of the date of his termination.

In some cases, the reason for termination determines whether a work disability should be awarded. See Jesse F. Acklin v. Woodson County, Docket No. 147,322 (May 1995). As above indicated, the record in this case leaves very unclear the precise reasons for termination. Perhaps both reasons independently justified the termination. In any event, the Appeals Board finds, for reasons explained below, that claimant probably or most likely could not have continued to perform his duties at Easton without some accommodation. The record contains no indication respondent was willing to accommodate the recommended restrictions. The Appeals Board, therefore, finds that claimant should be awarded work disability if it is shown by the evidence to be greater than the functional impairment. K.S.A. 44-510e.

Two (2) physicians testified regarding claimant's injuries. Dr. Bruce G. Ferris conducted a court-ordered independent medical examination. Dr. Ferris is a board-certified plastic hand surgeon. His examination revealed some decrease in claimant's grip. X-rays were normal and a bone scan revealed a mild synovitis around the elbows. Dr. Ferris testified that claimant complained of discomfort and pain in essentially all areas of his arms. Claimant's complaints were, according to Dr. Ferris, inconsistent with any particular diagnosis. He testified that he did not give a rating of the functional impairment, apparently because he did not understand that to be his assignment. He recommended, however, that claimant not lift greater than fifty to sixty (50-60) pounds.

Claimant was also examined by Dr. Ernest R. Schlachter at the request of his attorney. Dr. Schlachter diagnosed tendinitis of both wrists and rated claimant as having

a five percent (5%) permanent partial impairment of function of each upper extremity. He converted and combined the two (2) extremity ratings to a six percent (6%) whole body impairment. He recommended that claimant not do single lifts greater than twenty (20) pounds or repetitive lifting greater than ten (10). He also recommended restrictions of no repetitive pushing, pulling, twisting or grasping motions of either hand or arm, no work with vibrating tools and no work in cold environments.

The evidence convinces the Appeals Board that claimant could not have reasonably continued to perform his duties at Easton Manufacturing. Claimant testified that he was occasionally required to lift as much as one hundred (100) pounds, a job duty which would violate the restrictions recommended by Dr. Ferris as well as those recommended by Dr. Schlachter. The Appeals Board also finds that the restriction from repetitive work activities recommended by Dr. Schlachter is appropriate. The repetitive activities in the employment for respondent produced the initial symptoms. When claimant returned to work after leaving his employment with respondent, he again engaged in repetitive activities in employment with Smith Temporary Services and Harper Trucks, Inc. The repetitive use of his upper extremities, again, activated this symptomatology. Dr. Schlachter has testified that if claimant continues with repetitive activities, claimant's tendinitis will develop into carpal tunnel syndrome. Under these circumstances, the Appeals Board finds reasonable and appropriate the restriction limiting repetitive activities and also finds that the work for respondent would violate that restriction.

Mr. Jerry Hardin testified regarding the effect of this injury on claimant's ability to obtain employment in the open labor market and upon claimant's ability to earn comparable wages. He concluded that claimant's ability to perform work in the open labor market has been reduced by fifty-five to sixty percent (55-60%) based upon Dr. Schlachter's restrictions, and ten to fifteen percent (10-15%) based on Dr. Ferris' restrictions. He also testified that, in his opinion, claimant would have a thirty percent (30%) loss of ability to earn a comparable wage based upon Dr. Schlachter's restrictions and no loss of ability to earn a comparable wage based upon Dr. Ferris' restrictions.

In spite of Mr. Hardin's testimony, the Administrative Law Judge limited claimant's award to one based upon functional impairment of six percent (6%). The Administrative Law Judge did so on the basis of factors which convinced the Administrative Law Judge that the claimant was not making reasonable effort to obtain re-employment. The Appeals Board agrees that the evidence tends to indicate claimant is exaggerating the extent of his injury. The examination by Dr. Ferris, in particular, suggests claimant was making complaints not related to his physical injury. Claimant contends he is now unable to work. The medical evidence does not support this assertion.

After consideration of the various factors, the Appeals Board finds, as indicated above, that claimant is entitled to a work disability award. The Appeals Board also finds, from the evidence that claimant remains able to obtain employment at a wage comparable to his pre-employment wage, but is not making an effort to do so. The Appeals Board, therefore, concludes claimant has a 0% loss of ability to earn a comparable wage. It also appears appropriate to impose weight lifting restrictions similar to those recommended by Dr. Ferris. Mr. Hardin testified that the repetitive activity restriction limited claimant from approximately forty-seven percent (47%) of the labor market. Combining the restriction

from repetitive activity with the lifting restrictions, the Appeals Board considers the claimant to have lost fifty percent (50%) of his access to the open labor market. Giving equal weight to the loss of access and the loss of ability to earn comparable wage, the Appeals Board finds claimant has a twenty-five percent (25%) permanent partial general disability.

(2) The evidence does not establish any definite need for future medical treatment. The Appeals Board, therefore, finds claimant should be awarded future medical benefits only upon proper application to and approval by the Director.

(3) Claimant should be awarded and is entitled to unauthorized medical up to the statutory maximum upon presentation of the statement for such expenses.

DOCKET NO. 181,131

(1) Claimant has not established that he sustained additional permanent impairment arising out of and in the course of his employment with the respondent, Smith Temporary Services.

After claimant left employment with respondent, Easton Manufacturing, he drew unemployment for approximately six (6) months. One (1) month after the unemployment benefits ceased claimant found employment through Smith Temporary Services for light duty jobs. Smith placed him at Harper Trucks, Inc. doing cleanup work. Claimant worked at Harper Trucks, Inc. as an employee of Smith Temporary Services from May 13, 1993 to May 23, 1993. Claimant testified that after several days of work the symptoms, which had not completely gone away, worsened. The symptoms continued to worsen for the next few days while he worked for Smith Temporary Services. Based upon the history given, Dr. Schlachter concluded that claimant suffered some additional permanent disability as a result of his work. Specifically, Dr. Schlachter concluded that approximately ten percent (10%) of the six percent (6%) functional impairment would be attributable to the work at Smith Temporary Services.

The Appeals Board, nevertheless, concludes that no award should be entered against Smith Temporary Services. The conclusions reached by Dr. Schlachter were based upon the history given by claimant. As indicated, the Appeals Board considers the history given by claimant as to exaggerate the nature and extent of his symptoms. In addition, the Appeals Board understands Dr. Schlachter's testimony to indicate that he would have recommended, and considered appropriate, the same work restrictions before claimant started with Smith Temporary Services as he would have after. He attributes only six tenths percent (.6%) of the general body impairment to the work at Smith Temporary Services. The Appeals Board, therefore, concludes that none of the work disability is attributable to Smith Temporary Services and no award should be entered against them.

DOCKET NO. 181,132

The Appeals Board finds that claimant has not established that he suffered any permanent partial impairment as a result of his work for Harper Trucks, Inc. After working for approximately ten (10) days at Smith Temporary Services, he worked for approximately

three (3) days at Harper Trucks, Inc. The work at Harper Trucks, Inc. did involve repetitive work with his upper extremities. Because this work made his symptoms worse, claimant advised Harper Trucks, Inc. that he was unable to do the work and left their employment. None of the doctors, including Dr. Schlachter, felt claimant suffered any additional permanent impairment as a result of his work at Harper Trucks, Inc. Claimant's request for benefits to be paid by Harper Trucks, Inc. should, therefore, be denied.

AWARD

AWARD FOR DOCKET NO. 180,130

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rance Ball, and against the respondent, Easton Manufacturing, and the insurance carrier, Aetna Casualty & Surety, for an accidental injury sustained from September 1, 1991 to June 24, 1992.

The claimant is entitled to 12 weeks temporary total disability at the rate of \$173.05 per week or \$2,076.60 followed by 403 weeks at \$43.26 or \$17,433.78 for a 25% permanent partial general body disability, making a total award of \$19,510.38.

As of November 30, 1995, there would be due and owing the claimant 12 weeks temporary total compensation at \$173.05 per week in the sum of \$2,076.60 plus 167.14 weeks permanent partial compensation at \$43.26 per week in the sum of \$7,230.48 for a total due and owing of \$9,307.08 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$10,203.30 shall be paid at \$43.26 per week for 235.86 weeks or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with their counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent, Easton Manufacturing, to be paid direct as follows:

Deposition Services

Deposition of Rance E. Ball	\$291.80
Deposition of Ernest R. Schlachter, M.D.	\$294.80
Transcript of Regular Hearing	\$323.50
Deposition of Jerry D. Hardin	\$490.00
Transcript of Continuation of Regular Hearing	\$377.00

Barber & Associates

Transcript of Preliminary Hearing	\$182.00
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Don K. Smith & Associates

Deposition of Bruce G. Ferris, M.D.	\$213.00
Deposition of Joseph E. Linscott	\$162.75

RANCE BALL

7DOCKET NOS. 181,130; 181,131; 181,132

IT IS SO ORDERED.

AWARD FOR DOCKET NO. 180,131

WHEREFORE AN AWARD IS HEREBY DENIED IN ACCORDANCE WITH THE ABOVE FINDINGS. Smith Temporary Services and Fidelity and Casualty of New York have no liability in this case.

IT IS SO ORDERED.

AWARD FOR DOCKET NO. 180,132

WHEREFORE AN AWARD IS HEREBY DENIED IN ACCORDANCE WITH THE ABOVE FINDINGS. Harper Trucks, Inc., has no liability because the parties have stipulated to material misrepresentations. Any payment made by Harper Trucks, Inc. is to be reimbursed by the Workers Compensation Fund.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven Foulston, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
D. Steven Marsh, Wichita, Kansas
Gary Winfrey, Wichita, Kansas
Scott Mann, Hutchinson, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director